UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BENNIE GOODE, JR., Appellant, v. DEFENSE LOGISTICS AGENCY, Agency.	DOCKET NUMBER PH07528810492 DATE: SEP 5 1990

Bennie Goode, Jr., Richmond, Virginia, pro se.

William C. Walker, Esquire, Richmond, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency has petitioned for review of the November 29, 1988, initial decision that reversed its removal action. For the reasons set forth below, the Board GRANTS the agency's petition, REVERSES the initial decision, and SUSTAINS the agency's removal action.

BACKGROUND

The agency removed the appellant from his position as a Computer Products Equipment Operator, based on a third

offense of absence without leave (AWOL) and a third offense of failure to follow established leave procedures. Specifically, the agency charged the appellant with failing to report for duty on May 10, 11, and 12, 1988, and with failing to request and receive authorization from his supervisor for those absences. The notice of proposed removal referenced the appellant's disciplinary record for the preceding 6-month period, which consisted of the following: (1) A 5-day suspension, effective March 22 through March 26, 1988, for a second offense of AWOL and failure to follow leave procedures; (2) a "Letter of Leave Requirement" issued on February 18, 1988; (3) a written reprimand issued on January 28, 1988, for a first offense of AWOL, failure to follow leave procedures, and failure to work scheduled overtime; (4) a January 9, 1988, counseling session concerning the appellant's leave usage (during which the appellant was instructed regarding the requirements for properly requesting leave); and (5) a December 23, 1987, counseling session concerning the appellant's failure to follow established leave procedures in connection with his unauthorized absence on December 22, 1987. After considering the appellant's written reply to the proposal notice, the agency's deciding official found that the charges were fully supported by the evidence and warranted the appellant's removal.

The appellant filed a petition for app his removal to the Board's Philadelphia Regional O He

waived his right to a hearing. The administrative judge reversed the agency's action, finding that the charges against the appellant had not been proven by preponderant evidence. In making that determination, the administrative judge found that: (1) The agency, by phoning the appellant to discuss his absence on May 11, 1988, waived the "call-in" requirement specified in the appellant's "Letter of Leave Requirement"; (2) notwithstanding the agency's waiver of its "call-in" requirement, the appellant had requested leave for May 10 through 12, 1988; and (3) the agency failed to show that its denial of the appellant's leave request was reasonable.

In its petition for review, the agency contends, inter alia,[1] that the evidence of record shows that: (1) The agency did not waive its "call-in" requirement; and (2) the appellant did not request leave in advance of his absences on May 10, 11, and 12, 1988, and thereby violated the procedures set forth in his "Letter of Leave Requirement." We agree.

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[1] The agency also asserts that, even if the appellant had requested leave without pay for the dates in question, it would not have been unreasonable for the agency to deny such a request under the circumstances. Because we find that the appellant did not request leave for May 10, 11, or 12, it is unnecessary for the Board to address this question.

ANALYSIS

The agency proved its charges by preponderant evidence.

In reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only as much weight as may be warranted by the record and by the strength of the administrative judge's reasoning. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). In the instant case, the administrative judge's factual findings are contrary to a preponderance of the evidence of record and, consequently, do not merit the Board's deference.[2]

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[2] The administrative judge stated that he would resolve the factual dispute between the appellant and the agency regarding the approval of leave for May 10, 11, and 12, 1988, by making credibility determinations pursuant to *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). *See* Initial Decision at 3-4. The agency questions the propriety of rendering such credibility determinations in this case, because no hearing was held and the appeal was decided solely on the basis of the parties' written submissions. We find, however, that the administrative judge properly adapted the principles for resolving credibility issues to this case where no testimony occurred. *Cf. Donato v. Department of Defense*, 34 M.S.P.R. 385, 389-90 (1987) (although the administrative judge's credibility determinations were not based on the demeanor of witnesses because the case was decided on the written record and, thus, the Board was free to substitute its own determinations of fact, the Board will not reconsider fact-findings simply on the basis of the agency's allegations that the administrative judge failed to give sufficient weight to the evidence).

The administrative judge did err by failing to address the appellant's allegation that he was discriminated against by the agency. *See Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987). Because the appellant's bare allegation of discrimination was unidentified as to

The appellant was issued a "Letter of Leave Requirement" on February 18, 1988, because of his possible abuse of leave privileges.[3] *See* Appeal File (A.F.), Tab 4g. That letter instructed the appellant to make all future requests for annual leave 24-hours in advance, except in emergencies. It further stated that annual leave requested for emergency purposes must be made no later than four hours after the beginning of the appellant's tour of duty. In addition, the appellant was required to make his requests for leave personally to his supervisor unless acceptable circumstances beyond his control prevented him from doing so. The "Letter of Leave Requirement" also informed the appellant that his requests for leave would be evaluated on a case-by-case basis and that, if his supervisor considered a request for emergency leave to be unwarranted, the appellant's resulting unauthorized absence would be charged to AWOL.

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type, was wholly unexplained, and was unaccompanied by any supporting evidence, however, we do not believe that the administrative judge's omission was significant or that it affected the appellant's substantive rights. *See Meads v. Veterans Administration*, 36 M.S.P.R. 574, 582 (1988) (a bare allegation of discrimination is insufficient to satisfy an employee's burden of proof); *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

[3] The "Letter of Leave Requirement" indicated that the appellant's annual and sick-leave balances stood at zero at the time of his January 9, 1988, counseling session. *See* Appeal File, Tab 4g. It further indicated that the appellant had accumulated 649 hours of leave without pay as of February 8, 1988.

The appellant initially complied with the "Letter of Leave Requirement" when he called his supervisor on May 3, 1988, to request annual leave due to the death of his mother-in-law. The appellant's supervisor granted him leave for May 3, and, when he failed to report for duty on May 4, phoned the appellant to clarify the extent of his leave request. At that time, the appellant told his supervisor that his mother-in-law's funeral was scheduled for May 7, a Saturday, and that he consequently needed to be absent from work until May 10. The appellant's supervisor again granted the appellant's leave request. The appellant did not report for work on May 10, however. Nor did he phone his supervisor to request additional leave to explain his continuing absence. Thus, because the appellant properly requested and received approval for leave to cover the period of May 3 to May 10, we find that it was reasonable for the agency to require that he make a separate leave request in connection with his absences on May 10, 11, and 12.

Although the appellant's supervisor took it upon herself to call the appellant on May 11, 1988, the second day of the appellant's 3-day unauthorized absence, it is clear that the supervisor did so merely to ascertain the appellant's whereabouts and his plans for returning to work that week. There is nothing to suggest that the supervisor's action effectively constituted a "waiver" of either the agency's established leave procedures or of the

specific instructions set forth in the appellant's "Letter of Leave Requirement." Indeed, the appellant acknowledged, in his response to the agency's notice of proposed removal, that he understood that it was not his supervisor's responsibility to call him on those occasions when the appellant would be unable to report for work. *See* A.F., Tab 4c. In any event, even if we considered the supervisor's May 11 call to the appellant as a "waiver" of the appellant's "call-in" requirement for that day, there is no reason to extend such a "waiver" to May 10 and 12, since the appellant previously had indicated to his supervisor that he would be at work on May 10 and 12, yet he made no attempt on those days to contact her or any other responsible agency official to advise them of his situation.

Accordingly, we find that a preponderance of the evidence shows that the appellant failed to properly request leave in advance of his absences on May 10, 11, and 12, 1988, and that his failure to do so constituted a violation of the agency's leave procedures. Since the appellant did not properly request leave, we also find that the agency reasonably denied him leave and appropriately charged him with AWOL for the days in question.

<u>The agency's selected penalty of removal is within the tolerable limits of reasonableness.</u>

The sustained charges of AWOL and failure to follow established leave procedures warrant the imposition of some type of discipline. *See, e.g., Davis v. Veterans*

Administration, 792 F.2d 1111, 1112-13 (Fed. Cir. 1986) (absence without leave is inherently connected to the efficiency of the service). The selection of an appropriate penalty generally is left to the sound discretion of the agency. *See Bassett v. Department of the Navy*, 34 M.S.P.R. 66, 69 (1987). The Board's function in this regard is not to displace management's responsibility, but to determine whether management conscientiously considered the relevant factors and properly exercised its judgment within tolerable limits of reasonableness. *See id.*, citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

The agency's "Table of Offenses and Penalties" permits removal for the third offense of both AWOL and failure to follow leave procedures. *See* A.F., Tab 4b. Although the agency's table of penalties is only one factor to be considered in determining the appropriateness of the penalty, where the agency has such a table of penalties, the Board will adhere to the guidelines in the table unless a deviation from the suggested penalty is warranted under the circumstances. *See Facer v. Department of the Air Force*, 836 F.2d 535, 540 (Fed. Cir. 1988); *Williams v. Department of the Air Force*, 32 M.S.P.R. 347, 349 (1987); *Douglas*, 5 M.S.P.R. at 305-06.

The circumstances here suggest no reason to disturb the agency's penalty selection. The appellant was clearly on notice that the agency considered his leave usage excessive. After repeated counseling sessions concerning his leave

usage and the proper manner in which to request leave, the appellant was given a "Letter of Leave Requirement" on February 18, 1988, providing him with a detailed written explanation of the requirements for requesting leave. In March of 1988, the appellant was suspended for a second offense of AWOL and failure to follow leave procedures, and was informed that another leave-related infraction could result in further disciplinary action, up to and including removal. Notwithstanding the agency's efforts at counseling and "progressive discipline," the appellant again abused his leave privileges and failed to follow the guidelines for requesting leave, resulting in the charges which formed the basis for the instant action.

In his letter of decision, the agency's deciding official considered the appellant's poor past disciplinary record,[4] and found that the appellant's erratic attendance

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[4] An employee's past disciplinary record may properly be considered in determining the appropriate penalty to impose for a current charge of misconduct if the following criteria are met: (1) The employee was informed of the action in writing; (2) the employee was given an opportunity to dispute the action by having it reviewed by a different authority than the one who imposed the penalty; and (3) the action was made a matter of record. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). These criteria were met in this case with regard to the appellant's past leave-related disciplinary record. We find, however, that it was improper for the deciding official to also consider the appellant's 1985 90-day suspension for embezzlement of government money in determining the penalty, because that particular action was not referenced in the agency's notice of proposed removal. *See Harris v. Department of Transportation*, 29 M.S.P.R. 430, 432 (1985). We find the error to be harmless, however, in light of our current evaluation of the reasonableness of the penalty. *See Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983) (reversal of an action is warranted

and continued disregard of leave procedures resulted in a loss of confidence on the part of the appellant's supervisors, showed that the appellant's potential for rehabilitation was poor, and demonstrated his "flagrant disregard for authority." *See* A.F., Tab 4b. The deciding official determined that alternative sanctions would be ineffective to alter the appellant's conduct, and concluded that the appellant's removal was warranted. We agree with those determinations, and find that the agency's selection of removal as the appropriate penalty was within the limits of reasonableness under the circumstances. *See Douglas v. Veterans Administration*, 5 M.S.P.R. at 306.

ORDER

This is the final order of Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You

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only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency), *aff'd*, 735 F.2d 488 (Fed. Cir. 1984), *cert. denied sub nom. Schapansky v. Department of Transportation*, 469 U.S. 1018 (1984).

must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Matthew Shannon
for Robert E. Taylor
Clerk of the Board

Washington, D.C.